1979

Triangle Oil, Inc. , A Corporation v. North Salt Lake Corporation, Municipal Corporation of the State of Utah; John R. Graves, William D. Jackson, Richard v. Strong, Joe W. Vande Merwe, and Rodney J. Wood, Councilmen : Brief of Defendants-Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

TRIANGLE OIL, INC.,
a corporation,

Plaintiff and
Appellant,

vs.

NORTH SALT LAKE CORPORATION,
a Municipal Corporation of
the State of Utah; JOHN R.
GRAVES, WILLIAM D. JACKSON,
RICHARD V. STRONG, JOE W.
VANDE MERWE, and RODNEY J.
WOOD, Councilmen,

Defendants and
Respondents.

Case No.

BRIEF OF DEFENDANTS-RESPONDENTS

Appeal from the Second Judicial District
of Davis County, State of Utah
The Honorable J. Duffy Palmer, Judge

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Respondents

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NATURE OF CASE

This is an action to compel Defendant City to issue Plaintiff a license to sell beer and for damages for refusing to issue to Plaintiff a license to sell beer.

DISPOSITION IN LOWER COURT

The trial court granted Defendants' motion to dismiss for failure to state a claim on which relief may be granted.

STATEMENT OF FACTS

On or about November 10, 1978, Plaintiff filed an action in the Second Judicial District Court for Davis County, State of Utah, against the city of North Salt Lake, a municipal corporation, and the members of the city council. Plaintiff sought a judgment declaring to be unlawful the City's beer licensing and regulation ordinance to the extent that it limited the number of retail beer outlets to four.

Prior to filing its Complaint, Plaintiff had applied for a class A retail beer license to sell beer at its place of business where it also sells gasoline and groceries. The city council denied the application on the basis that there were then seven retail beer outlets in the City and Ordinance No. 77-8 restricts the number of retail beer outlets to four. 1/

1/ Ordinance No. 77-8 also prohibits the sale of beer where gasoline is sold. The ordinance also provides that it "shall not operate to reduce the number of businesses now licensed to sell beer whether issued by this municipality or by the county is such business is annexed...." Several businesses holding county authorized beer licenses have been annexed since the ordinance was adopted.

Plaintiff's sole challenges to the action of the City in denying its application to sell beer are that there is no statutory legislation enabling the City to restrict the number of retail outlets for the sale of beer and that the City must justify the ordinance by presenting evidence showing the need for such an ordinance.

Defendants otherwise accept Plaintiff's statement of facts in its Brief, except that Defendants maintain that the statutory enabling legislation cited by Plaintiff show that the City has authority to restrict the number of retail outlets selling beer.

ARGUMENT

POINT 1. NORTH SALT LAKE HAS THE AUTHORITY TO ENACT AN ORDINANCE RESTRICTING THE NUMBER OF BUSINESSES SELLING BEER AT RETAIL.

Municipalities exercise their legislative powers through ordinances. 2/

Utah law provides in part:

> The governing body may pass any ordinance to regulate, require, prohibit, control or supervise any activity, business, conduct or condition authorized by this act or any other provision of law. 3/

Utah law also provides:

> The powers herein delegated to any municipality shall be liberally construed to permit the municipality to exercise the powers granted by this act except in cases clearly contrary to the intent of the law. 4/

2/ Section 10-3-701, Utah Code Annotated, 1953 (Supp. 1977).
3/ Id. at section 10-3-702.
4/ Id. at section 10-1-103.

The foregoing provisions were enacted as one act in Laws of Utah 1977, Chapter 48.

Utah law also provides:

> Cities and towns within their corporate limits...shall have the power to license, tax, regulate or prohibit the sale of light beer, at retail, in bottles or draft....5/

Plaintiff urges this Court to hold that the City has no power to restrict the sale of beer except at retail or draft (the phrase "other original containers" not appearing in the act) and that the City may not restrict the number of "class A" retail beer licenses for the reason that there is no specific enabling legislation.

Defendants submit that Plaintiff's objection to the phrase "other original containers" is a distinction without substance. Section 32-4-17 enables cities to "license, tax, regulate or prohibit the sale of light beer, at retail, in bottles or draft...."

Plaintiff urges this court to hold that the term "regulation" as used in section 32-4-17 means something other than the authority to limit the number of retail beer licenses. Presumably, that something other means hours of business or perhaps the location within the store or the city where beer may be sold. Yet Plaintiff's Complaint buttresses Defendants' position.

Prior to 1935, state law prescribed the number of retail beer licenses which could be issued according to population. The statute, cited by Plaintiff at page 4 of its Complaint, was repealed

5/ Id. at section 32-4-17.

in 1937 and the present enabling legislation was enacted. Essentially, the legislature determined that the sale of beer should be regulated at the local level.

> It is well settled that municipalities may be invested with the power to limit the number of liquor licenses to be issued within their boundaries, and under such delegated authority may enact ordinances restricting or limiting the number of licenses that may be granted for the conduct of liquor business within the municipal limits. In fact, it has been said that the mere vesting of a municipality with the power to regulate the retail sale of intoxicating liquors vests the municipality with the power to fix by ordinance a reasonable limit on the number of retail liquor licenses to be issued. 6/

> It seems that municipalities may be invested with the power to limit the number of liquor licenses to be issued within the boundaries, and that where this authority is delegated, either expressly or under a general charter power of regulation, ordinances in pursuance of such grant of authority will be upheld as valid. 7/

Generally, under power to regulate and license liquor vending places, a municipal corporation can limit the number of licenses

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6/ 45 Am Jur 2d, Intoxicating Liquors, §135; Thielen v. Kostelecky, 69 N.D. 410, 287 N.W. 513.

7/ 124 A.L.R. 820 (1939); People ex rel. Fitzgerald v. Harrison, 99 N.E. 903 (Ill. 1912); State ex rel. Howie v. Northfield 101 N.W. 1063 (Minn. 1904); State ex rel. McIntire v. Libby 82 P.2d 587 (Mont. 1938); In Re Jorgensen, 106 N.W. 462 (Neb. 1906); Bjordal v. Town Board of Town of Delvan, 230 Wisc. 543, 284 N.W. 534 (1939).

to be issued to vendors and vending establishments. 8/

The regulation or prohibition of intoxicating liquors or of their sale, traffic or possession is within or based on, or constitutes an exercise of the police power. The right to regulate the sale of intoxicating liquors by the legislative power given if within the police power of the state is practically limitless. 9/

In Shaw v. Orem City, 10/ the court cited Riggins v. District Court where the plaintiff had challenged an ordinance prohibiting the sale of beer on Sunday arguing that light beer was not an intoxicant. The Riggins court held:

> The authority of the state to control and regulate the sale and use of light beer as defined in the act does not depend upon its being characterized by the act as intoxicating. The authority of the state under its police power to regulate the manufacture and use of light beer is to be determined by the nature of such beer rather than by the general characterization given to it by the lawmaking body. 11/

8/ 9 McQuillin, Municipal Corporations, §26.191; Gartland v. Talbott, 72 Idaho 125, 237 P.2d 1067 (1951); State v. City Council of Northfield, 94 Minn. 18, 101 N.W. 1063 (1904); State v. Womach 355 Mo. 486, 196 S.W. 2d 809 (1946); State v. City Council of City of Libby, 107 Mont. 216, 82 P.2d 587 (1938); Parks v. Allen, 426 F.2d 610 (5th Cir. 1970); De Caro v. Collierville 213 Tenn. 254, 373 S.W.2d 466 (1963); Winther v. Village of Weippe, 91 Idaho 798, 430 P.2d 689 (1967).

9/ Shaw v. Orem City, 117 Utah 288, 214 P.2d 888 (1950).

10/ Ibid.

11/ 89 Utah 183, 51 P.2d 645 (1935).

In Shaw v. Orem City the court held:

> That the state may prohibit the sale of intoxicating liquors is too well settled to require citation of authority. It may delegate such powers to cities. State v. Briggs, 46 Utah 288, 146 P.261.
>
> * * *
>
> The power conferred is to "license, tax, regulate or prohibit" the sale of light beer at retail. It seems to us patent that since a city may prohibit, it may elect not to prohibit but to permit, under such conditions or restrictions as the descretion of its governing authority may dictate, subject, or course to conformity with state law. 12/

In Shaw, the Court quoted favorably from Gunnarssohn v. City of Sterling, 13/ as follows:

> The language of the ordinance is not as broad and comprehensive as that of the city council to prohibit without any restriction whatever, while the latter only prohibits in less quantities than five gallons. A general power to prohibit is obviously sufficient to authorize any partial prohibition deemed advisable.

It appears from the language of Shaw that the Utah Courts construe the word "prohibit" to mean "regulate". Section 10-8-42 authorizes cities to prohibit the sale of beer. Following the rationale of Shaw cities could prohibit more than four retail outlets from selling beer within the city limits. As section 32-4-17 enables cities to regulate the retail sale of beer, it is unnecessary to argue that prohibit also includes the authority to limit. It is clear from the statutes and Utah

12/ Op cit. fn. 9.
13/ 92 Ill. 569 at 573.

case law that Utah municipalities are given broad latitude in regulating the retail sale of beer and that the enabling legislation is to be construed to accomplish the legislative purpose.

In Union Pacific Railroad Company v. The Mountain States Telephone and Telegraph Company 14/ the telephone company argued that Salt Lake City had no authority to grant the railroad the use of the city streets under a statute which provided that the City:

> ...may construct, maintain and operate waterworks, sewer collection, sewer treatment systems, gas works, electric light works, telephone lines or public transportation systems, or authorize the construction, maintenance and operation of the same by others.... (Emphasis the Courts). 15/

The Court held:

> Consistent with the view taken by the authorities generally, this Court has approved a somewhat broad and realistic view of grants of authority to render a public service. In the case of Ogden City Ry. Co. v. Ogden City, et al., the plaintiff had been granted permission in 1883 to operate a street railway under a statute which authorized the city to exercise the power of eminent domain over streets in behalf of steam and horse railways. Seven years later, the city authorized another company to operate an electric street railroad over the same streets. The plaintiff there argued that the statute did not authorize the city to permit its streets to be used in

14/ __P.2d__ (Utah April 12. 1979).
15/ Section 10-8-14, Utah Code Annotated 1953.

> connection with electric railroads. The court observed that at the time of the enactment, electric railways were not mentioned because they were not in use, but that through ingenuity and invention they had come into use and were performing the same function as the horse railways had done. The court concluded that in carrying out the purpose of the law, the statute should be construed to include electric railways. The same principle of law was applied in the later case of Rich v. Salt Lake City Corp. The question arose as to whether the city could engage in bus transportation under a statute which permitted cities to "construct, maintain and operate . . . telephone lines or transportation systems, or authorize the construction, maintenance and operation of the same by others. . ." This Court rejected the argument of plaintiff that the language should be given a narrow and restrictive application. In accordance with what we think is the sound doctrine: that the law and its interpretation should keep abreast of changing conditions, it adopted the realistic view that inasmuch as motor buses had become the more practical means of street transportation, the authorization of the city to maintain and operate transportation systems was not limited to the former "street railway," but should reasonably be deemed to include transportation by buses. 16/

Defendants submit that the clear legislative intent is directed toward the regulation of the sale of beer, not whether the beer is sold in bottles, cans or at draft. It is illogical to maintain that cities may regulate the sale of beer sold in bottles or at draft, but not in cans or plastic baggies.

16/ In the Union Pacific case, supra, the court added a footnote: 20 Utah 2d 339, 437 P.2d 680 (1968); cf also Spangler v. Corless, 61 Utah 88, 211 P.692 where this court held that under the exemption statute, sec. 6925(6) C.L.U. 1917 of ". . .one horse, with vehicle and harness,. . . used by a physician . . ." was held to exempt an automobile; and the fact that the motive power is gasoline instead of a horse was not of material significance.

POINT II. THE CITY NEED NOT PRESENT PROOF OF THE EVILS ASSOCIATED WITH THE SALE OF BEER IN ORDER TO RESTRICT THE NUMBER OF RETAIL OUTLETS.

Defendants submit that the City need only demonstrate enabling legislation to establish the legality of its ordinances. It need not present any factual basis showing the need for the ordinance, the enactment of ordinances being a legislative function of elected municipal officials.

However, in this case, it is submitted that the Court may take judicial notice that the sale and consumption of an alcoholic beverage is somewhat of more concern to the public safety, health and welfare than hours a barber keeps in his place of business.

The Eighteenth Amendment to the Constitution prohibited the sale of liquor, except for medical uses. In repealing the Eighteenth Amendment, the Twenty-first Amendment conferred something more than normal state authority over the public health, welfare, and morals. 17/

In Stanton v. Superior Court in and for Graham County, 18/ the court held that the police power of the state is fully competent to regulate the liquor business and to mitigate its evils or suppress it entirely. The court also held that a citizen has no inherent right to sell intoxicating liquors, and since the liquor business is attended with danger to the community, it may be entirely prohibited or it may be permitted under such conditions as will limit to the utmost its evils.

17/ Arizona State Liquor Board v. Poulos, 112 Ariz. 119, 538 P.2d 393 (1975).

18/ 55 Ariz. 514, 103 P.2d 952 (1940).

In Garcia v. Arizona State Liquor Board, 19/ the court held that states have power to regulate in the field of intoxicating liquors in a manner which would be precluded by other provisions of the Constitution if other commodities or activities were involved.

In Sail'er Inn, Inc. v. Kirley, 20/ the court held that the state had particularly broad powers with respect to the manufacture of and traffic in alcoholic beverages because of the damages to the public health and safety inherent in the sale and use of alcohol.

Defendants submit that the overwhelming, if not unanimous, opinions of the courts, which have considered the matter, hold that the sale of liquor may be controlled, regulated or prohibited as an exercise of the police powers and that such regulations made take a form different than that which would be permitted for other businesses. 21/

19/ 21 Ariz. App. 456, 520 P.2d 852 (1974).
20/ 95 Cal. Rptr. 329, 485 P.2d 529 (1971).
21/ See Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 420 P.2d 735, 55 Cal. Reptr. 23 (1966); Sibert v. Department of Alcoholic Beverage Control, 337 P.2d 882, 169 C.A. 2d 563 (1959); Farah v. Alcoholic Beverage Control Appeals Bd., 324 P.2d 98, 159 C.A. 2d 335 (1958); State v. Meyers, 376 P.2d 710, 85 Idaho 129 (1962); Tri-State Hotel Co. v. Londerholm, 408 P.2d 877, 195 Kan. 748 (1965); Drink, Inc. v. Babock, 421 P.2d 798, 77 N.M. 277 (1966); Yarbrough v. Montoya, 214 P.2d 769, 54 N.M. 91 (1950); Alamogordo Imp. Co. v. Prendergast, 109 P.2d 254, 45 N.M. 40 (1941); State ex rel. Hart v. Parham, 412 P.2d 142 Okla. 1966; Marcus v. State ex rel. Alcoholic Beverage Control Bd., 411 P.2d 539 (Okla. 1966); Houser v. State, 540 P.2d 412, 85 Wash. 2d 803 (1975).

Additionally, in Utah, the sale of liquor containing more than three and two-tenths alcohol by volume is a state regulated monopoly. 22/

It is submitted that the Court may properly take notice of the problems related to the sale and consumption of alcoholic beverages. An ordinance regulating the sale of beer would be valid and the City need not present evidence of the particular problems related to the sale and consumption of beer. An ordinance enacted under specific and valid authority from the legislature should be sustained regardless of the court's opionion of the reasonableness of the ordinance. 23/

POINT III. THE NORTH SALT LAKE BEER ORDINANCE DOES NOT DENY PLAINTIFF EQUAL PROTECTION

Plaintiff suggests that the City's classification of beer licences into classes A, B, and C raises equal protection issues. Defendants submit that the classifications are for revenue purposes only. The applicant may have any classfication he or she desires, if there are licenses available. Plaintiff appears to suggest that if the City issues a class A license, it must also issue a class B and a C license, or, that it must issue at least two licenses for each classification in order to avoid the

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22/ Sections 32-1-1 et seq., Utah Code Annotated 1953.
23/ Huston v. Des Moins, 176 Iowa 455, 156 N.W. 883 (1916); State v. Chicago, M & St. P. R. Co., 114 Minn. 122, 130 N.W. 545 (1911); Lake View v. Tate, 130 Ill. 247, 22 N.E. 791 (1889); Roswell v. Bateman, 20 N.M. 77, 146 P. 954 (1915); 56 Am Jur 2d, Municipal Corporations, section 362.

chance of creating a monopoly. Such an argument, if successful, would destroy the power to restrict the number of retail beer outlets.

Finally, Plaintiff urges this Court to require a system of rotating beer licenses. That position was not raised below and should not be raised here. However, the case of Anderson v. Utah County Board of Commissioners, 24/ correctly observes that a person having a license and in operation "should have some preference over any new application...."

Defendants submit that the preference over a new applicant may have been grounded on the distinction recognized by the courts between an application for a renewal and a new application.

Ordinarily, a person who makes an application for a liquor license does not have a vested right to engage in the liquor business. 25/ The denial of a license by a proper authority with discretion in the matter generally does not deprive an applicant of either liberty or property. 26/ By contrast, the application for a renewal of a liquor license was considered subject to procedural due process. In Manos v. City of Green Bay, 27/ the court found that the applicant had a "property" interest in the renewal of his liquor license in that he had investment which the applicant had in physical improvements to his business and his expectation that he would be in business for over one year were sufficient to warrant the guarantee of minimal due process. In reaching this

24/ 589 P.2d 1214 (Utah 1979).
25/ Bjordal v. Town Board of Town of Delvan, supra, n. 7.
26/ 9 McQuillin, Municipal Corporations (3rd Ed.) pp. 508-510, Section 26.195.
27/ 372 F. Supp. 40 (1974).

decision the court held:

> The plaintiff in this case has a substantial property interest in retention of his liquor license, since, if the revocation is allowed, he will not only lose his sole source of income, but will also lose a substantial sum of money which he has invested in physical improvements to his business establishment. 28/

Plaintiff's suggestion that some system of rotation be required by this Court is illogical and would impose burdens on existing licensees which very well may be prohibited by the Fourteenth Amendment of the United States Constitution. 29/

CONCLUSION

1. The City of North Salt Lake has statutory enabling authority to restrict the number of retail beer outlets to four.

2. The City may properly refuse to issue a new license to sell beer where the number of existing retail beer outlets exceeds four.

3. The City classification for the sale of beer is not arbitrary, unreasonable or capricious or a denial of equal protection.

4. No evidence beyond that contained in the record is required in order to show that the City's beer licensing ordinance is lawful.

28/ Id. at 372 F. Supp. 47.
29/ See City of Kenosha v. Bruno, 412 U.S. 532 (1973).

Respectfully submitted this _____day of _____, 1979.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing Brief of Defendants-Respondents was mailed, postage prepaid, to George K. Fadel, Attorney for Plaintiff-Appellant, 170 West Fourth South, Bountiful, Utah 84010.

DATED this _____day of _____, 1979.